

United States Court of Appeals
For the Ninth Circuit

M. C. SCHAEFER, *Appellant,*
— vs. —

SAM MACRI, DON MACRI, JOE MACRI, W. R. MCKELVY
and CONTINENTAL CASUALTY COMPANY, a Corpora-
tion, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE, W. R. MCKELVY

W. PAUL UHLMANN,
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PAUL P. O'BRIEN

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Appellees. } No. 13129

UPON APPEAL FROM THE UNITED STATES DISTRICT
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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE, W. R. MCKELVY

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The appellant correctly states the questions involved and the manner they are raised on this appeal. The primary question is whether or not the complaint as amended states a cause of action against any defendant. The defendants separately filed motions to dismiss the complaint which motions were consolidated for hearing. Motions to dismiss the original complaint and amended complaint were granted with permission to the plaintiff to amend. The motions to dismiss the second amended complaint were granted with prejudice against filing an amended complaint and judgment of dismissal was entered in favor of all the

defendants (R. 532-534). The plaintiff appeals from this judgment.

The other question on appeal is whether or not the court erred in denying appellant's application to file a supplemental complaint. It was stipulated by all the appellees at the time this motion was presented, that for the purpose of the argument on the motions to dismiss, the allegations of the proposed supplemental complaint would be considered a part of the second amended complaint (R. 563). There is, therefore, no particular issue on this point.

For a proper understanding of the trial court's ruling, dismissing the action, it is necessary to consider the allegations of the second amended complaint (R. 367-498). It is voluminous and a reiteration in different form of the contents of the two previous complaints (R. 3, 42).

The following is a brief review of the second amended complaint:

The first five paragraphs allege jurisdiction; identify of the defendants; allege a prime contract obtained by the Macris on the so-called Roza Division, Yakima Project on December 7, 1943; allege Philp and Goerig became silent partners or joint adventurers with the Macris; and allege the plaintiff executed a subcontract with Macris for concrete work on the project on March 14, 1944.

Paragraph VI is the paragraph which attempts to allege a cause of action. First, there is a general allegation that the defendants with malice and intent to injure plaintiff in his performance of said subcontract

and otherwise did unlawfully and in accordance with preconceived plan confederate" to bankrupt plaintiff and ruin his business and credit. In furtherance of said conspiracy the defendants engaged in "a series of tortious acts" consisting of:

A, B.—Macris breached their contract with plaintiff in certain particulars (R. 371). Philp and Goerig entered into a fictitious termination agreement with the Macris on July 15, 1944 (R. 371).

C, D.—Defendant McKelvy became a "co-conspirator" on November 1, 1944, when plaintiff employed him to cancel the subcontracts with the Macris and sue in quasi contract. McKelvy undertook the employment and plaintiff divulged to him all facts with reference to the Macris' defalcation (R. 372). McKelvy then advised plaintiff (1) to finish the contract, which plaintiff did "under protest" (R. 376); (2) suggested "certain courses of action" rejected by plaintiff as constituting a fraud on his creditors (R. 376); (3) delayed bringing the suits and on October 20, 1945, terminated the employment advising plaintiff that Continental Casualty Company was a client of his office and further advising plaintiff the statute of limitations would run against his lawsuit in "about" a month (R. 377). Concludes all of McKelvy's conduct was motivated by an intent (a) to bankrupt and disgrace plaintiff and (b) to stall the lawsuit against the Macris until the statute of limitations had run, which was prevented by the diligence of plaintiff (R. 378).

E.—Plaintiff employed a Yakima attorney and proceeded with his lawsuit against the Macris (R. 378).

(Appellant in open court stated he employed the particular Yakima attorney on the recommendation of McKelvy and after he had asked for the name of a good attorney to bring the suit (R. 356, 497-498)).

F, G.—A suit was instituted in Oregon by the Macris against plaintiff which was "willful abuse of legal process" (R. 379). Plaintiff brought a suit in Yakima County, Washington, against the Macris and Continental Casualty Company through the attorney recommended by McKelvy (R. 380). (This suit was tried before the Hon. Sam M. Driver, Judge, and resulted in a judgment for plaintiff in the sum of \$57,686 and interest (R. 462)). Memorandum opinion of the trial judge in the Yakima suit is set forth in Exhibit M to the complaint (R. 438).

H.—Conspiracy was "furthered" by the Macris, Philp and Goerig and Continental Casualty appealing the Yakima judgment to the Circuit Court, which court affirmed the judgment of the trial court (R. 382) and after a petition for rehearing being denied a petition for a writ of certiorari to the United States Supreme Court was filed and denied as well as a rehearing thereon (R. 381-382).

I.—Judgment was paid by Continental (R. 383).

J.—McKelvy asked plaintiff to pay for services rendered (St. 383-4).

K.—Plaintiff sought to engage his Yakima attorney to bring this lawsuit and was refused (R. 384).

Paragraph VII attempts to allege damages by the statement that by reason of "the premises aforesaid and all of the acts and omissions of defendants and

each of them in furtherance of their aforesaid pre-conceived and concerted plan and conspiracy and as the direct and proximate result thereof," plaintiff had no personal credit with which to conduct his business, suffered severe financial losses as the result of the curtailment of his business activities, suffered damage to his reputation and suffered mental anguish, and was prevented developing and marketing certain inventions all to his damage in the sum of \$1,000,000 (R. 385).

Defendant McKelvy moved to dismiss this complaint on grounds a cause of action was not alleged and the Statute of Limitations barred any cause (R. 499). Like motions were interposed by Continental and the Macris (R. 500, 502). These motions were consolidated for hearing and were heard before the Hon. William J. Lindberg, Judge, on August 6, 1951 (R. 555) and judgment of dismissal entered August 7, 1951 (R. 532) and plaintiff appeals.

At the time of the hearing of the motions directed to the second amended complaint, the plaintiff filed a motion for an order permitting the filing of a supplemental complaint (R. 516). This motion alleges McKelvy represented Macri and Continental in other litigation. The motion incorporates a request to add the name of B. J. Rask as party defendant, alleging that the said Rask called on the plaintiff in March, 1951, and threatened "the life and welfare of the plaintiff and his family" if he persisted in the instant litigation (R. 517). The appellees stipulated in open court that the allegations of the motion would be considered

a part of the second amended complaint in the hearing on the motions to dismiss the second amended complaint (R. 563).

There is incorporated in the record affidavits disclosing a dispute with Judge Lindberg's official court reporter (R. 548) which has no bearing on the issues of this appeal.

Appellant has incorporated in the record a transcript of the argument and proceedings on the hearing of the motions to the three complaints. The hearing on the motions directed to the original complaint were heard before Hon. Dal M. Lemmon, Judge, on January 11, 1951 (R.215). The motions to the amended complaint were heard before the Hon. Sam M. Driver, Judge, on April 16, 1951 (R. 279), and the motions to the second amended complaint were heard before the Hon. William J. Lindberg, Judge, on August 6, 1951 (R. 555).

ARGUMENT IN SUPPORT OF ORDER OF DISMISSAL

Appellee McKelvy respectfully submits the memorandum of authorities in support of his motion to dismiss the second amended complaint is an adequate citation of legal authority to support the trial court's decision and order dismissing the complaint as to all of the parties (R. 519). This memorandum is entitled against "third amended complaint" which is a typographical error. The third complaint was considered but it was the second amended complaint.

There are three essentials to tort liability in conspiracy. The complaint in this case lacks all three. They are (1) facts must be alleged, not conclusions; (2) an agreement or concert of action disclosing a meeting of minds must appear from the allegations; and (3) damages must be alleged.

In addition, the complaint in this cause on its face shows that as far as defendant McKelvy is concerned the statute of limitations has run.

The appellant in this case predicates a cause of action on the normal legal procedure involved in his success in obtaining compensation for the breach of contract by Macri of the subcontract with appellant. Appellant considers the fact he was successful in litigation concerning this breach justifies a further claim based on the inconvenience and expense involved. He has chosen to level a charge of "conspiracy" against every party who in any manner became a part of the parade of events between the date of execution of the subcontract with the Macris March 14, 1944 (R. 370) to final payment of the judg-

ment by Continental, the bondsman, on March 19, 1949, and even afterwards, when a request by Mc-Kelvy was made for payment of services rendered (R. 383) and his counsel refused to institute the instant litigation (R. 384). All the grievances which appellant cites are events and procedures normal in litigation and business transactions and in no way a violation of any right of appellant nor compensable through the court except, of course, his claim against the Ma-cris for which he obtained judgment and the judgment paid (R. 383).

**No Overt Act Performed
No Concert of Action**

The terms "conspire" or "malice" do not create a cause of action or state that a right has been violated. The tort of "conspiracy" is based on recovery of damages for an injury suffered by an unlawful act or a lawful act performed unlawfully pursuant to a formed conspiracy.

11 Am. Jur. "Conspiracy", Sec. 45.

The gravamen of civil liability in conspiracy is found in the overt act which is the result of conspiracy and culminates in damage to the plaintiff.

Nalle v. Oyster, 230 U.S. 165;

Sears v. Interational Brotherhood of Teamsters, etc., 8 Wn.(2d) 447, 112 P.(2d) 850;

Park-In Theatrest v. Paramount-Richards Theatres (D.C. Del.) 90 F. Supp. 727;

Roche v. Blair, 305 Mich. 628, 9 N.W.(2d) 861.

The *Nalle* case is the classic authority cited by all the courts of American jurisprudence that no recovery can be had for civil conspiracy unless there is an overt act resulting in damage.

The overt act which is the basis of liability must be done pursuant to a conspiracy. No formal agreement is necessary but a tacit understanding or concert of action in which the minds of the parties have met for a common purpose or design is necessary.

Kietz v. Gold Mines, Inc., 5 Wn. (2d) 224, 105 P. (2d) 71;

Calcutt v. Gerig (6 Cir.) 271 Fed. 220;

Puget Sound Power & Light v. Asia (D.C., Wash.) 2 F. (2d) 491;

Ransom v. Matson Nav. Co. (D.C., Wash.) 1 F. Supp. 244;

City of Atlanta v. Cherry, 84 Ga. App. 728, 67 S.E. (2d) 317;

Windsor Theatre Co. v. Walbrook Amusement Co. (D.C., Md.) 94 F. Supp. 388;

Asby v. Peters, 128 Neb. 338, 258 N.W. 639; 15 C.J.S. "Conspiracy", Secs. 1, 2.

In the *Ransom* case, the plaintiff sued several persons alleging they all "conspired" to "shanghai" her out of Honolulu to Yokohama on one steamship line and then another from Yokohama to Seattle, where she was taken by force to the city hospital and jail and charged with insanity. There were numerous other allegations of assault and slander. The court recognized that many of the allegations alleged torts but the complaint failed to disclose a concert of action demonstrating

a meeting of the minds and the terms "conspiracy" or "malice" added nothing to the complaint.

"The mere statement that the parties conspired, or that there was conspiracy, is not enough. The stated conclusion must be predicated upon facts or circumstances showing that there was collusion, confederation, co-operation and related acts between the parties to carry out conjointly the unlawful enterprise, each to do necessary acts to effect the joint enterprise."

The general words "conspiracy" and "malice" are but conclusions of the pleader. It is necessary that facts be alleged from which the natural inference is that there was a concert of action to do something illegal which results in harm to the pleader.

Puget Sound P. & L. Co. v. Asia (D.C. Wash.)
2 F.(2d) 491;

Black & Yates v. Mahogany Ass'n (3 Cin.)
129 F.(2d) 227;

MacGriff v. Antwerp, 327 Mich. 220, 41 N.W.(2d) 524.

The third circuit in the *Black & Yates* case cited above said:

"A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment."

In the *Puget Sound P. & L.* case the court said:

"The phrase 'conspired and confederated' are impotent in a civil action, and to give potency facts must be set out which show malicious conduct."

The overt act necessary to a conspiracy action must, as a general rule, be such as to give rise to individual liability in order to create a liability for others in the plan.

Manhattan Quality Clothes, Inc. v. Cable, 154 Wash. 654, 283 Pac. 460;

Hutchinson Realty Co. v. Hutchinson, 136 Wash. 184, 239 Pac. 388;

Nalle v. Oyster, 230 U.S. 165;

Harding v. Ohio Cas. Ins. Co., 230 Minn. 327, 41 N.W.(2d) 818;

Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir.) 72 F.(2d) 885;

Miller v. Ferguson, 55 Cal. App. 502, 203 Pac. 772;

Lynch v. Rheinschild, 86 Cal App. 672, 195 P.(2d) 448;

Elmhurst v. Shoreham Hotel (D.C. D.C.) 58 F. Supp. 484;

Nathanson v. Brown & Williamson Tob. Co., 189 M. 1024, 68 N.Y.S.(2d) 914;

Interstate Holding Corp. v. Hammerman (1950) 101 N.Y.S.(2d) 648.

The only time that an act lawful in itself can become unlawful by combination is where the mere force of numbers create an unusual circumstance which results in injury to a third party and then only when the act of the group does not have the excuse of self-interest or competition.

11 Am. Jur. "Conspiracy", Sec. 46;

Delorme v. International Bartenders' Union, Local 624, 18 Wn.(2d) 444, 139 P.(2d) 619;

Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.(2d) 1083;

Neustadt v. Employers Liability Assur. Corp., 303 Mass. 321, 21 N.E.(2d) 538;

Liappas v. Angoustics (Fla. 1950) 47 So. (2d) 582.

In the instant case no single defendant was induced to do anything by the other defendants and none of them did anything in defending the lawsuit except what was legitimate in protecting their individual interests. This they have a right to do.

If there was originally a conspiracy to breach the contract with the Macris, certainly McKelvy was not a party to that conspiracy as conspiracy applies to future events not past ones.

Ransom v. Matson Nav. Co. (D.C., Wash.) 1 F.S. 244;

Harding v. Ohio Cas. Ins. Co., 230 Minn. 327, 41 N.W.(2d) 818.

Appellants in open court said it was the circumstance of delay in bringing the suit rather than any agreement or understanding with any other defendant that was the basis of his suit against McKelvy (R. 336).

There is nothing in appellant's complaint which were not justified in defending the appellant's charges in the Yakima suit. Fraud or conspiracy canot be insinuated.

Cox v. Cox, 259 Wis. 259, 48 N.W.(2d) 508;

City of Atlanta v. Cherry, 84 Ga. App. 728, 67 S.E.(2d) 317;

Windsor Theatre Co. v. Walbrook Amusement Co. (D.C., Md.) 94 F. Supp. 388.

The record discloses the trial judge in the Yakima suit who heard the motions in this case directed to the second amended complaint stated in open court that not only was the bonding company justified in defending the suit but he would have considered the agents derelict in their duty in not doing so (R. 339).

Where conduct alleged in a complaint as the basis of a conspiracy is as consistent with the doer's self interest as a malicious purpose to injure another, it must be assumed to be the former and legal.

It would be indeed a dangerous thing for the courts to hold an unsuccessful defending litigant responsible for additional damages because he saw fit to assert a defense to litigation instituted against him.

In *Puget Sound Power & L. Co. v. Asia* (D.C. Wash.) 2 F.(2d) 491, the court said:

"The only act charged against defendant is the bringing of an action in the state court, a court of competent jurisdiction. This was lawful. Fancying they had a grievance and claiming a right in themselves, they had a right to sue (*Savile v. Roberts*, 1 Ray. 374), and having a right to sue the law does not inquire into the motives (*Clark v. Clapp*, 14 R.I. 248; *Robertson v. Montgomery B.B. Ass'n*, 141 Ala. 348, 37 So. 388, 109 Am. St. Rep. 30, 3 Ann. Cas. 965).

"A court will not presume that a court of com-

petent jurisdiction will permit itself to be made the instrumentality through which an unlawful purpose may be accomplished."

A litigant defending fancying he has a right to defend must be accorded that privilege with immunity.

See also:

Manhattan Quality Clothes v. Cable, 154 Wash. 654, 283 Pac. 460;

Cattlett v. Chestnut, 108 Fla. 475, 146 So. 547;

Moffett v. Commercial Trust Co. (D.C. Mo.) 87 F. Supp. 438, Aff. 187 F.(2d) 242 (8 Cir.), Cert. d., 96 L. ed. 29, 96 L. ed. 66;

Interstate Holding Corp. v. Hammerman, 101 N.Y.S.(2d) 648;

Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W.(2d) 1083;

Burns v. Spiller (D.C., D.C.) 4 F.R.D. 299.

Washington in the *Manhattan Quality Clothes Co.* case held that a suit would not lie for malicious prosecution without the arrest of the person or attachment of the property. Use of the courts is not sufficient as the basis of a lawsuit unless in an extreme case there has been an abuse of process by party plaintiff and then it must appear that there is no grounds whatsoever for an assertion right through the court.

Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123, 257 Pac. 638.

It is doubtful that American jurisprudence discloses a single case where a successful litigant sues to recover because his claim has been defended. There are several

cases where an unsuccessful litigant has attempted to recover charging the litigation to be fraudulent and the courts universally have dismissed them. Such a case is *Moffett v. Commercial Trust Co.* (D.C. Mo.) 87 F. Supp. 438, and the court said:

“All the averments of the complaint show that the challenged acts or decisions were done or rendered in the regular course of judicial procedure after due process.”

And quotes from *Snowden v. Hughes*, 321 U.S. 1:

“The lack of any allegation in the complaint here, tending to show a purposeful discrimination * * * is not supplied by the opprobrious epithets “willful” and “malicious” * * *.”

On appeal the Circuit Court, 187 F.(2d) 244, said:

“All that the complaint in the present case charges against the individual defendants is that by their resort to the State courts for the settlement and administration of complicated estates the plaintiff, as one of the interested parties, has been involved in expensive, prolonged, and generally unsuccessful litigation. * * *”

Damages Are Not Alleged

Appellant in Paragraph VII of the second amended complaint (R. 385) attempts to allege damages by the general statement that he suffered financial losses, damage to his reputation and mental anguish and that he was prevented in developing and marketing certain inventions. We will not prolong this brief unnecessarily to discuss the conjectural nature of the damages claimed and the impropriety of seeking damages for mental anguish in this kind of action. Suffice it to say

that no damages are alleged because there are no facts which show damages to result as a natural consequence of any act of any of the defendants except the breach of the Macris, which was fully compensated for in the judgment secured and paid in the Yakima suit.

The gist of an action in conspiracy is the damage not the conspiracy.

Moyer v. Cordell (Okla.) 228 P.(2d) 645;

Lallathin v. Keaton, 198 Okla. 312, 178 P. (2d) 101;

Hoffman v. Johnston (Ohio) 36 N.E.(2d) 184;

15 C.J.S. "Conspiracy," Sec. 6.

The damage must appear upon the face of the complaint to be a natural consequence of defendant's act. A causal connection between the acts alleged and the damage claimed must appear.

Orloff v. Metropolitan Trust Co., 17 C.(2d) 484, 110 P.(2d) 396;

Hoffman v. Johnston (Ohio) 36 N.E.(2d) 184;

Foster and Kleiser Company v. Special Site Sign Co. (9 Cir.) 85 F.(2d) 742, Cert. d. 299 U.S. 713;

15 C.J.S., Sec. 26.

In the C.J.S. referred to, we find the following language:

"It is not sufficient simply to state that damage did in fact result; but the facts should be alleged from which the court can see, if the facts are

true, the damage which would naturally or possibly result from the act stated."

The allegation of damages cannot be a mere conclusion of the pleader.

In *Farmers Elevator Service v. Hogan* (D.C., Mo.) 8 F.R.D. 230, the Missouri District Court said:

"* * * And the complaint must be sufficient to show damages by reason of the wrongful acts complained of. 25 C.J.S., Damages, §130, page 745, 746. Furthermore, a complaint must show how the plaintiff sustained his damages. *Pacific Coin Lock Co. v. Coin Controlling Lock Co.*, 9 Cir., 31 F.(2d) 38. See also *B. F. Avery & Sons v. J. T. Case Plow Works*, 7 Cir., 174 Fed. 147. And it is held by the text writers that it is not sufficient to allege damages as a mere conclusion of the pleader. 25 C.J.S., Damages, §130, page 748."

Moreover, damages claimed in conspiracy where no public wrong is involved are special damages and must be pleaded as such.

Catlett v. Chestnut, 108 Fla. 475, 146 So. 547.

As in the case of fraud so in the case of civil conspiracy, facts must be averred which show a concurrence of fraud and damage.

Puget Sound Power & Light v. Asia (D.C., Wash.) 2 F.(2d) 491.

There is no allegation in the complaint which shows or indicates any act of any of the defendants and in particular any act of McKelvy caused any damage to the appellant. He alleges he employed McKelvy to

bring a lawsuit and McKelvy was dilatory in the matter. He employed another attorney and obtained what the trial court stated was almost a 100% victory.

“THE COURT: This I must say is a unique and a very unusual experience for me. It’s difficult for me to understand, but I’m trying to get your point of view. Here’s a case that was a very close and difficult one, I think. I happen to know Mr. Olson was very much concerned about it and didn’t think his chances were too good of winning in the Court of Appeals; I thought the chances were not much more than even. I wouldn’t have bet one way or another what the Court of Appeals would have done. You were well represented. Mr. Olson presented the case very well. * * *. You got almost a perfect result, and here I find you suing the losers and the attorney for a million dollars. It’s a queer situation. I think perhaps you’ve come to the realization which many litigants don’t, that litigation necessarily and unfortunately is expensive, and that it isn’t as profitable even for the winner as is sometimes thought.” (R. 338-339)

Statute of Limitations Has Run Against Any Claim Against McKelvy

The statute of limitations has run against any claim against appellee McKelvy. The complaint alleges appellant employed McKelvy on November 1, 1944, and the employment was terminated in October, 1945 (R. 342, 377). The statute applicable is either Remington’s Revised Statutes, Section 159, or Section 165. The pertinent part of Section 159 reads:

“An action for taking, detaining, or injuring personal property, including an action for the

specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated."—is barred in three years

Section 165 reads as follows:

"An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

It has been recognized generally that the two-year statute applies to causes in conspiracy.

Mitchell v. Greenough (9 cir.) 100 F.(2d) 184;

Theurer v. Condon, 34 Wn.(2d) 448, 209 P. (2d) 311.

The complaint at most alleges that McKelvy conspired with the others to injure appellant by not bringing the lawsuit against the Macris after he had agreed to do so and this caused injury to appellant's credit and reputation. The only other allegation pertaining to McKelvy in the complaint is that found in Paragraph VI, J, which alleges that McKelvy requested appellant to pay for his services. Appellant filed his complaint in the District Court for the Western District of Washington, Northern Division, Cause No. 2673, on December 1, 1950 (R. 12).

There is a distinction between criminal and civil conspiracy so far as the application of the statute of limitations is concerned. In criminal conspiracy, the general rule seems to be that the statute runs from the last overt act performed to accomplish the conspiracy. The rule in civil conspiracy is of necessity different because civil conspiracy is based upon recov-

ery of damages for injuries inflicted by the overt act. Liability attaches upon the execution of the overt act which results in damages.

11 Am. Jur., "Conspiracy," Section 45, page 567, Note 18;

Nalle v. Oyster, 230 U.S. 165.

The statute of limitations therefore must run from each overt act which results in damage unless, of course, there is continuing series of acts performed in a contemplated course of action.

Burnham Chemical Co. v. Borax Consolidated (9 Cir.) 170 F.(2d) 569, Cert. d. 336 U.S. 924;

Momand v. Universal Film Exchange (1 Cir.) 172 F.(2d) 37, Cert. d. 336 U.S. 967, 337 U.S. 934, 337 U.S. 961;

Williamson v. Columbia Gas & Electric, 186 F.(2d) 464;

Glenn Coal Co. v. Dickinson Fuel Co. (4 Cir.) 72 F.(2d) 885;

Moffett v. Commercial Trust Co. (D.C., Mo.) 87 F. Supp. 438.

Appellant's Motion to File Supplemental Complaint

The appellant specifies as error the court's denial of his motion permitting the filing of supplemental complaint. There is no reversible error in this matter because the court on stipulation of all the appellees considered the allegations of the motion as part of the second amended complaint (R. 563). The matter would be consequence only in case this court reversed the

trial court's order dismissing the action in which case the appellant would automatically be entitled to a ruling of the trial court on his application to name Mr. Rask a party defendant.

This motion has no bearing on the issue of this appeal.

APPELLANT'S BRIEF

This appellee has in effect met any argument of appellant's brief by the foregoing argument. Appellant cites *Lyle v. Haskins*, 24 Wn.(2d) 883, 168 P.(2d) 797, to the effect that the Washington Supreme Court holds that conspiracy can be alleged by circumstantial evidence. This case held that proof of a conspiracy like an other fact may be established by circumstantial evidence. A conspiracy may be alleged through a set of circumstances which compel an inference of confederation but that is not the case here. No tortious acts are alleged and the acts alleged are consistent with the parties self interest and repel any inference of malice.

The allegations of appellant's complaint as far as conspiracy is concerned are "impotent" words of "combine", "conspire", "confederate" and "conspiracy" no illegal act by any of the parties appellees is alleged and particularly nothing of a tortious nature by Mr. McKelvy.

The reference in appellant's brief, page 8, to subparagraphs C and D of Paragraph VI of the Second Amended Complaint demonstrates how the pleader attempts to insinuate the missing allegations. In fact he has pleaded himself out of court when he charges

McKelvy "attempted to accomplish the aforesaid ends of said conspiracy and almost succeeded," admitting thereby that no damage was done.

The copy of the proceedings before Judge Bowen found on pages 11 and 12 insinuates that Judge Bowen adjudged a cause of action was alleged. The appellees were simply interested to know what the effect of the order of transfer was, that is, whether or not it was for the particular motions or all of the proceedings involved in the litigation.

Appellant has cited no authority to sustain his position that his extremely verbose complaint alleges a cause of action.

MISSTATEMENT IN COMPLAINT

This court may take judicial notice of its records in any case.

Atlantic Fruit Co. v. Red Cross Line (2 Cir.) 5 F.(2d) 218;

In re Robinson, 9 Wn.(2d) 525, 115 P.(2d) 734;

31 C.J.S., "Evidence," Sec. 50, page 624, notes 44 and ff.

Therefore, it is proper for this court to notice the record on appeal of Mr. Schaefer's Yakima case, *Continental Casualty Company v. Schaefer*, Cause No. 11707 (173 F.(2d) 5) and other cases involving Continental Casualty Company, in which Mr. Schaefer was not a party litigant, *Goerig et al. v. Continental Casualty Company*, Cause No. 11723-11726, incl. (167 F.(2d) 930).

Appellant has alleged that Willard E. Skeel of this appellee's law firm appeared as attorney of record representing Continental Casualty Co. in the appellant's litigation in Yakima. This statement appears in sub-paragraph D of Paragraph VI of the Second Amended Complaint (R. 377). Exhibit I, referred to in this paragraph, on its face bears the number 246 and the title, "*U.S.A. for the Use of M. C. Schaefer, etc.*" (R. 415). Then appears as a record of the proceedings part of the record in another lawsuit in which Continental Casualty Compay was a party and in which Mr. Willard E. Skeel was attorney of record for Continental Casualty. This case was tried on February 21, 1947, and was consolidation of five "Use" cases numbered 250, 251, 255, 257 and 267, brought up to the Ninth Circuit Court in causes numbered above. The case which Mr. Schaefer brought was known in the trial court as No. 246 and was tried in Yakima on February 24, 1957 (R. 461). Neither Mr. Willard E. Skeel nor anyone connected in any way with this appellee's law firm represented any party in this litigation. The same trial judge heard Mr. Schaefer's cases and the five consolidated "Use" cases. This judge called to Mr. Schaefer's attention at the time of the hearing of the motions in this case directed to the amended complaint, that Mr. Eugene D. Ivy of Yakima was the attorney of record for Continental Casualty Company in the litigation which this appellant instituted in that court (R. 351).

This appellee calls these facts to the attention of the court in order that there may be no misunderstanding as to Mr. Willard E. Skeel's conduct with refer-

ence to representation of Continental Casualty Company.

CONCLUSION

It is, therefore, respectfully submitted that the trial court's order and judgment of dismissal must be affirmed and the complaint against this appellee dismissed because no cause of action is alleged against appellee McKelvy in conspiracy; no unlawful act is alleged nor the unlawful performance of an act; no overt act in pursuance to a conspiracy is alleged in the complaint; all the facts alleged show conduct of the parties which was legal and for which they cannot be held accountable for any resultant injury to the appellant; no damage is alleged and the statute of limitations has run against any cause of action against appellee McKelvy.

Respectfully submitted,

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